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IN THE

Supreme Court of the United States

October Term, 1982

ZENITH RADIO CORPORATION,

Petitioner

v.

THE UNITED STATES and
MONTGOMERY WARD & CO., INC.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF BETHLEHEM STEEL CORPORATION	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	7
The Decision of the Court of Customs and Patent Appeals Nullifies the Statutory Right of Domestic Labor and Industry to Participate in Antidumping and Countervailing Duty Proceedings and the Right to Judicial Review	7
CONCLUSION	9

TABLE OF AUTHORITIES

Statutes: Page

19 U. S. C. §§ 160-173 7
19 U. S. C. § 1303 7
19 U. S. C. § 1516a 8
19 U. S. C. § 1675(a) 8
19 U. S. C. § 1675(d) 8
Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1109, 93 Stat. 144, 314 (1979) 8

Legislative:

Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance, 96th Cong., 1st Sess. at 210 (1979) 7
Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means, 96th Cong., 1st Sess. generally, and esp. 630-32, 648 (1979) 7
Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 174-175, 186 (1979) 8
Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979) 8
S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979) 8
S. Rep. No. 96-402, 96th Cong., 1st Sess. 12, 23-24 (1979) .. 8
H. R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979) 8
H. R. Rep. No. 96-585, 96th Cong., 1st Sess. 6-7 (1979) 8

Administrative:

Exec. Order 12188, 45 Fed. Reg. 989 (1980) 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Bethlehem Steel Corporation ("Bethlehem") respectfully urges the Court to grant the Petition for a Writ of Certiorari to review the erroneous judgment of the United States Court of Customs and Patent Appeals, entered without a proper record before it and without the benefit of briefing or oral argument, which summarily directs the United States Court of International Trade to dismiss this suit for lack of jurisdiction. The correct resolution of the questions presented is profoundly important to Bethlehem and to the domestic steel industry in the United States, as well as to the television manufacturing industry, most immediately affected by this ruling.

INTEREST OF BETHLEHEM STEEL CORPORATION [1]

Bethlehem manufactures, fabricates, and sells steel and steel products. It is the second largest producer of steel in the United States, and distributes steel products principally through its own sales organization, which has sales offices, mill depots, or supply stores in numerous locations in the United States. Its primary markets include the construction, transportation, service center, and processor markets. In this business, Bethlehem competes for sales within the United States against domestic importers of foreign steel and against foreign steel-producing interests, many of which are heavily subsidized, or owned, by foreign governments. A large proportion of the foreign steel which the United States imports is imported at dumping prices, *i.e.*, at import prices that are far below the prices at which the products are sold in the foreign countries where they are produced.

Steel products produced by subsidized foreign mills and imported at dumping prices are threatening to destroy the United States steel industry. In 1979, imports accounted for 15.2% of apparent domestic steel consumption. In 1981 imports surged to a share of about 19%, during the fourth quarter of 1981 capturing approximately 24% of domestic consumption. This trend continues. In the first quarter of this year, imports of foreign steel increased by 34.7% over the levels of the same period last year, and imports continue to account for more than 20% of apparent domestic consumption.

Simultaneously, and partially as a consequence of the sharp increase in foreign steel's share of domestic consumption, the United States steel industry is currently operating at approximately 42% of production capacity—the lowest level since 1938. Employment in the industry is at the lowest point since 1933. About one third of the

1. Pursuant to Rule 36 of the rules of this Court, written consent to file this brief amicus curiae has been obtained from the Solicitor General and from Zenith Radio Corporation and Montgomery Ward & Co., Inc.

nation's steelworkers, more than 100,000 people, are on layoff, and another 29,000 are working reduced schedules. These figures do not reflect the substantial adverse effects of the decline of the steel business on the domestic coal industry and on other related industries.

American steel producers have sustained serious losses. Bethlehem lost $113.8 million on sales of $3.35 billion during the first six months of 1982. Bethlehem's shipments during the second quarter were the lowest for any quarter in more than 20 years. Second-quarter losses have also been reported by Jones & Laughlin Steel Corporation, National Steel Corporation, Wheeling-Pittsburgh Steel Corporation, and Inland Steel Co. United States Steel Corporation, which is diversified, has reported sharply reduced earnings, and steel-related businesses were, according to the analysts, substantially unprofitable.

In January, 1982, Bethlehem and other steel producers filed countervailing duty and antidumping actions against steel producers from France, West Germany, Italy, Belgium, the Netherlands, the United Kingdom and Luxembourg, and preliminary or final countervailing and antidumping duty determinations have been made in many of these proceedings. Additional pending petitions involve steel products from Brazil, South Africa, Roumania, Spain and Korea.

On June 11, 1982, the United States Department of Commerce made preliminary determinations that the seven European countries and South Africa and Brazil had subsidized the producers of a number of major steel mill products that are imported by the United States, the subsidies in some instances amounting to as much as $240 per ton.

On August 10, 1982, the Department of Commerce acted on the antidumping petitions, finding that steel imported from Belgium, France, Italy, West Germany, the United Kingdom, and Romania had been imported at prices less than fair value. The dumping margins found by the Commerce Department substantiate import pricing

at levels as much as 40% below prices in the foreign markets.

The findings in the countervailing duty and antidumping proceedings should result in the imposition, under the United States customs laws, of duties on certain imported steel products and are an important step in the enforcement of United States trade laws. However, the issuance of countervailing or antidumping duty orders by the Commerce Department does not assure that the unfair trade practices of subsidization or dumping will be arrested or that the destructive effects will be neutralized. Rather, that result depends on the continuing, proper ascertainment and assessment of duties which equal and offset the margins of subsidization or dumping that are associated with these import transactions.

Bethlehem, the domestic steel industry, and many other American industries have been vitally concerned with Zenith's case. Because of the importance and far-reaching effect of the decision of the Court of Customs and Patent Appeals below, an application was made to that court on behalf of Bethlehem and six other companies for leave to file an *amicus curiae* brief in support of Zenith's petition for rehearing. The other companies were Armco, Inc., Carlisle Tire & Rubber Company, PPG Industries, Inc., SCM Corporation, Stewart-Warner Corporation, and The Timken Company, and represented, in addition to the steel industry, domestic industries producing tires and inner tubes, glass, portable electric typewriters, speedometers, and roller bearings.

On March 24, 1982—one day after the motion for leave was filed—the Court of Customs and Patent Appeals denied our application and refused to consider our views on the critical issues presented.

The decision of the Court of Customs and Patent Appeals has effectively emasculated the carefully designed statutory machinery which Congress established to assure that countervailing and antidumping duties are assessed

in the correct amounts and collected, and that the fundamental trade policies of the nation are faithfully executed. The core of that apparatus is participation by all interested parties in the administrative process and in judicial review. The opportunities to participate in the process and to seek judicial review were deliberately conferred by Congress on domestic industry, as a matter of right. The lower court's decision, if permitted to stand, destroys that right, jeopardizes the effectiveness of the Congress' program to combat unfair competition, and may deal a serious blow to important industries in this country which are waging an uphill competitive battle against foreign imports that are dumped and subsidized by foreign governments.

The future of the United States steel industry as a viable component of the domestic economy hinges in important part on the faithful execution of the laws Congress has enacted to protect independent firms in this country from powerful international economic forces that are capable of causing illegitimate distortion of trade patterns and permanent, irreparable damage to the industrial sector of American business.

This is an unusual case, and one of the highest importance. The record in this case contains evidence of the most shocking conduct on the part of government officials charged with the responsibility to enforce the antidumping laws. There is evidence here that the Executive Branch directed $2 billion dollars of imported merchandise, subject to a formal finding of dumping under the Antidumping Act of 1921, to be liquidated at declared values that were actually known by the government officials involved to be false. The effect of this action would have been to reduce the amount collected. There is evidence here of egregious actions on the part of government officials entrusted with very important responsibilities.

Bethlehem believes that the decision of the Court of Customs and Patent Appeals in this case, holding that the

courts are powerless to inquire into and to check blatant circumvention of federal law by government officials themselves, is dangerous and mistaken. The ruling jeopardizes Bethlehem's vital, continuing interest in the proper enforcement of the antidumping and countervailing duty laws. Because of its urgent concern for the serious implications of the decision, Bethlehem files this brief *amicus curiae* and earnestly requests this Court to grant Zenith's Petition for a Writ of Certiorari to review the decision.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Decision of the Court of Customs and Patent Appeals Nullifies the Statutory Right of Domestic Labor and Industry to Participate in Antidumping and Countervailing Duty Proceedings and the Right to Judicial Review.

During the 1970's many industries in the United States were severely injured by unfair import practices, such as dumping and export subsidization. Although statutory remedies such as the Antidumping Act of 1921 (previously codified as 19 U. S. C. §§ 160-173) and the countervailing duty law (19 U. S. C. § 1303) had been in place for many years, the Executive Branch was manifestly unable or unwilling to enforce these laws in an effective manner. Extraordinarily delayed and inadequate duty assessments frustrated the objective of the laws. Domestic industries and their workers, the intended beneficiaries of these laws, had no effective say in or review of the duty assessment decision process.[2]

In 1979, Congress adopted drastic and important corrective measures to effectuate the intent of the trade laws. Congress persuaded the Executive Branch to restructure and transfer the responsibility for enforcement of the antidumping laws within the Executive Branch. Under this scheme of reorganization, the Treasury Department—which previously had administered these laws and had compiled a dismal record of non-enforcement—was relieved of

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2. *See, e.g., Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. *generally,* and *esp.* 630-32, 648 (1979); *Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance,* 96th Cong., 1st Sess. at 210 (1979).

further authority and responsibility in this field.[3] Congress also enacted the Trade Agreements Act of 1979, which provided a new framework for administrative and judicial review of countervailing and antidumping duty determinations—a framework that assured domestic interested parties the right to participate in the administrative and judicial process in these important international trade matters. *See,* Sections 751(a), (d) and 516A of the Tariff Act of 1930, as added by the Trade Agreements Act, Sections 101 and 1001, 19 U. S. C. §§ 1675(a), (d) and 1516a.

Section 751, in addition to expediting "the administration of the assessment phase of antidumping and countervailing duty investigations" provides "a greater role for domestic interested parties" and introduces "more procedural safeguards." *S. Rep. No. 96-249,* 96th Cong., 1st Sess. 80-81 (1979); *H. R. Rep. No. 96-317,* 96th Cong., 1st Sess. 72 (1979).

Section 516A assures that the same domestic interested parties have access to the courts in order to challenge administrative determinations of antidumping or countervailing duties to be assessed. *See,* 19 U. S. C. § 1516a(a)(2)(B)(iii); *H. R. Rep. No. 96-317, supra,* at 179; *S. Rep. No. 96-249, supra,* at 245, 250.

Notwithstanding the sweeping reforms that Congress enacted, the court below has effectively ruled: (a) that the Commerce Department is not required to follow the mandatory procedures specified in section 751; (b) that mandatory duties need not be assessed; (c) that domestic

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3. *See,* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1109, 93 Stat. 144, 314 (1979); *H. R. Rep. No. 96-585,* 96th Cong., 1st Sess. 6-7 (1979); *S. Rep. No. 96-402,* 96th Cong., 1st Sess. 12, 23-24 (1979); *Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations,* 96th Cong., 1st Sess. 174-175, 186 (1979); *Reorganization Plan No. 3 of 1979,* 44 Fed. Reg. 69273 (1979); Exec. Order 12188, 45 Fed. Reg. 989 (1980).

interests need not be afforded an opportunity to participate in proceedings designed to resolve questions of antidumping or countervailing duty liability; and (d) that domestic interests need not be permitted to obtain judicial review of administrative determinations of such liability.

Thus, even if the pending steel dumping and subsidy cases result in antidumping and countervailing duty orders, under the lower court's ruling in this case, the Executive Branch could enter into "settlement" agreements with foreign or import interests. Officials of the Executive Branch could disregard the direction of Congress expressed in the 1979 Trade Agreements Act, without concern that representatives of the workers and the industries affected by these secret compromises could obtain judicial review of their conduct and judicial scrutiny of their fidelity to the letter and intent of the law.

In short, the ruling below threatens to perpetuate the same longstanding abuses in the administration of the trade laws that Congress intended once and for all to stop.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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